

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

74-2542, 75-7003

United States Court of Appeals FOR THE SECOND CIRCUIT

CHRIS-CRAFT INDUSTRIES, INC.,

Plaintiff-Appellant-Cross-Appellee,

against

PIPER AIRCRAFT CORPORATION, HOWARD
PIPER, THOMAS F. PIPER, WILLIAM T. PIPER,
JR., BANGOR PUNTA CORPORATION, NICOLAS
M. SALGO, DAVID W. WALLACE and THE FIRST
BOSTON CORPORATION,

Defendants-Appellees-Cross-Appellants.

APPEAL FROM FINAL JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING

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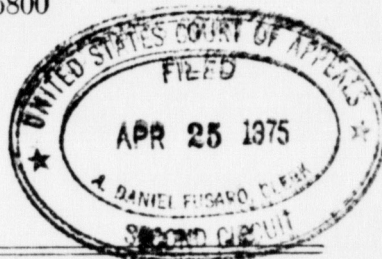
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Docket Nos. 74-2542, 75-7003

CHRIS-CRAFT INDUSTRIES, INC.,

Plaintiff-Appellant-Cross-Appellee,

against

PIPER AIRCRAFT CORPORATION, HOWARD PIPER, THOMAS F.
PIPER, WILLIAM T. PIPER, JR., BANGOR PUNTA CORPORATION,
NICOLAS M. SALGO, DAVID W. WALLACE and THE
FIRST BOSTON CORPORATION,

Defendants-Appellees-Cross-Appellants.

PETITION FOR REHEARING

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

Introduction

Howard Piper, Thomas F. Piper and William T. Piper, Jr. ("the individual Piper defendants") petition this Court pursuant to Rule 40 of the Federal Rules of Appellate Procedure for rehearing of these appeals and respectfully suggest rehearing *in banc* pursuant to Rule 35 of the Federal Rules of Appellate Procedure.

The Decision

A panel of this Court (Mansfield, Oakes and Timbers, CJs) rendered a decision on April 11, 1975 reversing the judgment of the district court (Pollack, DJ) entered in favor of plaintiff-appellant Chris-Craft Industries, Inc. ("CCI") in the amount of \$2,272,998.89. The judgment was based upon the finding after trial that CCI had suffered damages of \$1,673,988 and as a matter of discretion awarded CCI pre-judgment interest of an additional \$599,010.89. On CCI's appeal, this Court substituted its determination for that of the trial court and directed the entry of a modified judgment in favor of CCI in the amount of \$25,793,365 plus pre-judgment interest (at present this would amount to about \$9 million), for a total judgment of almost \$35 million.

Liability on the part of the individual Piper defendants is predicated on a prior determination by this Court that the individual Piper defendants had violated Section 14(e) of the Securities Exchange Act of 1934 [15 U.S.C. § 78n(e) (1970)] through two letters written on January 27 and 28, 1969 and a press release and shareholder letter written on January 29, 1969. This Court found that those writings caused injury to CCI "by denying it 'a fair opportunity to win the contest for control'" (p. 2837).^{*} Based upon that conduct in January 1969 the individual Piper defendants were held jointly and severally liable to CCI for damages presently amounting to almost \$35 million because more than seven months later Bangor Punta Corporation ("BPC") succeeded in acquiring control of Piper Aircraft Corporation ("Piper") by means of its own violations of Section 14(e) and Rule 10b-6, thereby defeating CCI's efforts to acquire control itself.

^{*} Page references are to the Slip Opinion.

Reasons for Granting Rehearing

The individual Piper defendants were admittedly not involved in either of BPC's violations. Thus, the district court and this Court found that BPC's purchases of Piper stock in May 1969 violated Rule 10b-6 but the individual Piper defendants did not participate therein. Similarly, the district court and this Court found that BPC's non-disclosure concerning its possible disposition of the Bangor and Aroostook Railroad in its exchange offer prospectus in July 1969 violated Section 14(e), a violation for which The First Boston Corporation was also found liable to CCI, but in which the individual Piper defendants did not participate—in fact, that prospectus was issued to them prior to their exchanging their shares of Piper stock for BPC securities. 480 F.2d at 353.

Thus, although the Court held that "BPC itself obtained control through its violations of the securities laws" (p. 2838), the individual Piper defendants were not participants in those violations. Their liability was premised solely on writings in January 1969 which were found to have denied CCI "a fair opportunity to win the contest for control" (p. 2837).

The district court on remand after the prior appeal conducted a four-day trial to place a value upon CCI's opportunity to gain control of Piper and found that the opportunity was worth \$1,673,988 plus pre-judgment interest. 384 F.Supp. at 523. On appeal, this Court abandoned its mandate to evaluate the concept of loss of the opportunity for control and, instead, furnished CCI with an insurance policy by awarding it "damages" measured not by the loss of the opportunity to win control but by the difference between what CCI allegedly paid for its Piper stock and the price at which it hypothetically could have sold that stock.*

* That this is an insurance policy is clearly reflected by then Chief Judge FRIENDLY's observation in *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937, 948 (2 Cir. 1969): "Probably there will no more be a perfect tender offer than a perfect trial."

This difference was determined, not as of the time of the individual Piper defendants' violations in January 1969, not at the time of BPC's obtaining control of Piper in September 1969, but as of a date in January 1970 when, the Court stated, CCI could have, through a hypothetical public offering, disposed of its shares of Piper stock acquired between December 1968 and August 1969 (p. 2857).

This result obtains although on the prior appeal the Court declared that "our holding is premised on the belief that the harm done the defeated contestant is not that it had to pay more for the stock but that it got less stock than it needed for control." 480 F.2d at 362. Based upon that holding, the Court on the prior appeal spelled out the formulation to be followed on remand to ascertain CCI's damages (480 F.2d at 380):

"The measure of damages should be the reduction in the appraisal value of CCI's Piper holdings attributable to BPC's taking a majority position and reducing CCI to a minority position, and thus being able to compel a merger at any time."

At the trial on remand, the parties presented expert testimony with vigorous cross-examination directed to the measure of that reduction. Judge Pollack made express and well-documented findings based thereon. 384 F.Supp. 507.

It is obvious that a quantum leap from a damage award of \$2 million to one of \$35 million is not a mere adjustment at the appellate level in the application of a formula. It is a rejection of one formula mandated in the Court's first decision and the substitution of a new one, a change not of degree but of kind.

Instead of the formula the prior opinion took pains to formulate and prescribe, the Court has now said it meant something different. CCI is not to be compensated for the reduction in value its stock presumably incurred when BPC

obtained a majority in September 1969. Instead, CCI, which claims it spent about \$44 million to acquire its stock, gets \$35 million in damages and keeps its shares. There is no way such a result can be reached without doing violence to the language of the formula prescribed in the Court's prior decision.

The formula now adopted is wholly unwarranted by the facts and is contrary to established principles of law. It sweeps away completely any question of the *causation* of the damages, adopts an inappropriate rescission theory of damages while CCI continues to own the Piper shares, a punitive result contrary to established principles of the 1934 Act, relies for findings of fact by the appellate court on the testimony of an expert witness (Wahrsager) presented by CCI whose testimony was found by the trial judge to be unacceptable (384 F.Supp. at 521) and in so doing effectively deprives defendants of their day in court on the damage issue as now reformulated.

(i) In its damage formula as stated in the prior decision, the Court required that damages be calculated by the reduction in value "attributable to BPC's taking a majority position and reducing CCI to a minority position."

In the instant decision the requirement that the damages chargeable to defendants be those caused by them is cast aside in toto. There can be no pretense that the defendants caused the damages to CCI as now determined. All witnesses agreed that the securities markets were in a precipitous decline between September 1969 and January 1970 for general economic reasons wholly unrelated to this case or any of its parties. The decline in the value of CCI's Piper holdings in that time period would have occurred even if it had acquired control of Piper and thereafter, as the district court found it apparently intended to do, sold its position to a third party. 384 F.Supp. at 519.

This is not a case, such as *Chasins v. Smith, Barney & Co.*, 438 F.2d 1167 (2 Cir. 1970), in which defendants im-

properly induced the plaintiff to make an investment and could therefore fairly be held for the loss suffered when he in fact sold out, even though general business and economic matters contribute to the loss. The individual Piper defendants did not induce CCI to invest in Piper. On the contrary, they strongly opposed CCI's acquiring shares and the basis of their liability to CCI is that they denied CCI the opportunity to acquire more! In such a case, a rescission theory of damages, indemnifying CCI against paper losses it incurred as a result of general market conditions—not any acts of defendants—is wholly inappropriate, unrelated to compensation for loss caused by any wrong, unjust, vindictive and punitive.

(ii) Notwithstanding the trial court's superior opportunity to appraise the credibility of the witnesses, this Court chose to accept the remarks of one of CCI's witnesses, one whose overall testimony was not favored by the trial court, and then proceeded to make its own findings of fact thereon in violation of established principles of procedure. The litigant's right to have the testimony heard and verified and the witness observed by the trier of fact is as fundamental as the right to be heard.

In acting as trier of fact the Court inevitably involved itself in conflicts and inconsistencies which strike at the heart of its findings on the decline in value of CCI's holdings of Piper stock. Thus, at page 2853 it said, "Our prior opinion contemplated the determination of a premium, which would have been paid for CCI's opportunity to obtain control, over and above the actual cost to CCI of Piper shares."

The district court, after hearing the evidence, determined that premium to be 5% of the "fair market value" of Piper stock in September 1969. That was the date all parties and this Court agreed was the proper date for valuation purposes (p. 2841, n. 10).

This Court disregarded the district court's findings as to the applicable percentage for the premium and, instead, while ostensibly setting a zero premium for the opportunity to obtain control (pp. 2853-4) finds, for the first time on this appeal, that there was a premium already built in to CCI's cost. Thus, on page 2855 of the opinion the Court declares "CCI's payments for Piper stock included a substantial premium for the opportunity to compete for control. Defendants' violations unlawfully deprived CCI of that opportunity." The Court, however, makes no effort to value that new-found premium. Completely ignoring the value of the opportunity for control, the Court merely shifts "the entire burden of CCI's loss to defendants" (*ibid.*). Hence, all the effort that went into the trial on remand and all the evidence presented at that trial amounts to naught. The individual Piper defendants who were found liable because they denied CCI "a fair opportunity to win the contest for control" (p. 2837) in January 1969—on which finding Judge Mansfield dissented on the prior appeal (480 F.2d at 401-3)—are now saddled with a \$35 million judgment calculated upon a hypothetical sale in January 1970. Thus, they are made liable for events occurring over the course of a year after their violations and are prevented from having any opportunity to adduce evidence on this newly-created theory of damages.

Defendants are as distressed as the Court over "the extraordinary length of time this litigation has already lingered" (p. 2852). However, no lapse of time alone justifies the injustice done to the individual Piper defendants by the Court abandoning, after the trial, its own precise and highly specific formula for damages, creating a new and different formula and then finding facts on appeal in reliance on representations of CCI not accepted by the trial court. The sketchy testimony concerning the supposed need for a registration statement for CCI's sale of Piper shares and the alleged inability to make one effective in

September 1969 was contradicted by defendants at the trial on remand but not ruled on because it was irrelevant to the issues tried. On oral argument in this Court when the question was raised, it was pointed out that there was in fact already available an effective registration statement which could have been used without difficulty by CCI to sell its stock on September 5, 1969. For this Court now to make and act upon a contrary conclusion in order to fix a \$35 million damage figure does violence to the principles of jurisprudence. No Congressional policy calls for such a punitive, vindictive result.

The submission of written reports by the experts does not warrant such a departure from established judicial procedures. They testified orally and were cross-examined by counsel and to a significant degree by the trial court itself. Confidence in the judgment of an expert can only come from observing that testimony and cross-examination. The Court, however, states (p. 2852):

"The ultimate determination of the value of CCI's holdings before and after BPC obtained control in the end would be made by us on the basis of essentially the same record now before us."

This is doubly in error.

First, if defendants were afforded an opportunity to try the issue of damages on the basis of the newly-adopted formula, the record would be completely different from the one presented at the trial under the prior opinion.

But even more important, "value" is the quintessential question of fact—always of fact—the determination of it should never be made at the appellate level, and certainly not made when defendants have been denied even the opportunity to brief the issue.

CONCLUSION

For the reasons stated above, this petition for rehearing, or rehearing *in banc*, should be granted and on rehearing the judgment of the District Court should be affirmed or remanded for further proceedings.

Respectfully submitted,

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